United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2073

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

LAW RESEARCH SERVICE, INC.,

Appellant.

On Appeal from the United States District Court for the Southern District of New York from the Order of Honorable Constance Baker Motley Affirming the Order of Asa S. Herzog, Bankruptcy Judge, allowing the Secured Claims of John Herbert Crook

BRIEF FOR APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the Order of Bankruptcy Judge Asa S. Herzog, made the 12th day of November 1973 so clearly erroneous as to require reversal?

2. Did Bankruptcy Judge Herzog lack jurisdiction to deny relief to Appellant and if so, must the order appealed from be reversed or vacated?

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

In the Matter

of

Docket No. 74-2073

LAW RESEARCH SERVICE, INC.

Appellant

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BRIEF FOR APPELLEE

Counter-Statement of Facts of the Case

On November 28, 1969, in New York, New York, the Appellant Law Research Service, Inc., later the Debtor, duly executed and delivered to John Herbert Crook, the Appellee, an assignment of its claim and demand and of any judgment and proceeds therefrom against The Western Union Telegraph Company to the extent of $25,923.65, with interest thereon at the rate of 8% per annum until payment, herein referred to as the "Assignment" (4a-6,7,8; 3a-19, 20).*

The Assignment was acknowledged in the form

(*References are to pages of the Joint Appendix)

required to entitle a deed to be recorded in the State of New York.

Due notice of the execution and delivery of the Assignment was given to the Western Union Telegraph Company, to the attorneys of record of the Debtor then prosecuting the action to enforce said claim in the New York Supreme Court and to the attorneys of record of Western Union on or about December 9th and December 3rd, 1969 (3a-31, 32,36,50; 5a-4).

The Assignment was delivered in exchange for an adjournment to May 31, 1970 of an action for damages for fraud pending against the Debtor and its President in Texas (4a- 1,2,3,4,5; 5a-2; 8a-1). No part of the portion of the claim assigned to Mr. Crook was paid by May 31, 1970 or at any time (3 a -9, 10).

A judgment was made on June 18, 1970 in the Supreme Court of the State of New York, County of New York, and entered in the Office of the Clerk of the Supreme Court and of the County of New York on June 23, 1970, in favor of the Debtor and against Western Union in an amount in excess of $1,000,000.

On June 22, 1970, a duplicate of the Assignment was duly filed in the Office of the Clerk of the Supreme

Court and of the County of New York, and an entry thereof made in the Clerk's Minute Book (3a-49; 5a -4).

On June 18, 1971, the Debtor filed a petition for an arrangement under Chapter XI.

On January 21, 1972, the Debtor proposed an arrangement. Said arrangement was confirmed by order of the Court dated June 20, 1972.

As of December 29, 1971, Debtor and Western Union entered into an agreement to settle and dispose of the claim and judgment then pending on appeal in the New York Court of Appeals, which provided, inter alia, that the judgment would be vacated and set aside, and that Western Union would deposit the sum of $455,000. in an account subject to countersignature of the Court to pay assignees of portions of the Debtor's claim against it and others claiming a security interest therein. The settlement was approved by the Bankruptcy Judge on April 11, 1972 (5a-5).

Thereafter, Western Union paid over and deposited the amounts due under the settlement, paying to Mr. Crook no part of the claim which had been assigned to him.

Mr. Crook duly filed his claim herein against the $455,000. fund on deposit for payment of claims of

assignees and secured creditors (2a - 1,2).

On July 19, 1972, after confirmation, the Debtor objected to Mr. Crook's claim and moved to vacate the Assignment on the grounds that it was not perfected as a "lien", and was voidable under Section 60 of the Bankruptcy Act (5a-5).

Hearings were held and evidence taken on the issues on October 31 and November 6, 1972. Thereafter, on April 20, 1973, Bankruptcy Judge (then Referee) Asa S. Herzog made his decision allowing the claim of Mr.Crook in full (5a-1 through 8).

Mr. Crook duly noticed an order for settlement and signature on May 7, 1973, embodying the decision. On May 7, 1973, Debtor moved by Order to Show Cause for leave to reargue (6a-2).

After extensive argument, on October 29, 1973, the Bankruptcy Judge denied the application for leave to reargue and adhered to his prior determination (6a- 1 through 16).

On November 12, 1973, the Bankruptcy Judge made the order overruling the Debtor's objections to Mr.Crook's claim and allowing it as a secured claim entitled to participate in the fund on deposit for that purpose (7a-1,2,3,4).

Although denominated as a "secured" claim, Mr. Crook asserts and has always asserted perfected title to a portion of the Appellant's chose in action and proceeds therefrom against Western Union, and more specifically, title to and ownership of his aliquot portion of the fund deposited for payment of assignees and secured creditors.

The Debtor sought review of the order of the Bankruptcy Judge to the United States District Court for the Southern District of New York. The District Court (Motley, D.J.) affirmed the findings and order of the Bankruptcy Judge (8a-1).

ARGUMENT

POINT I

THE DETERMINATIONS OF FACT BY THE BANKRUPTCY JUDGE, AFFIRMED BY THE DISTRICT COURT, DENYING DEBTOR'S OBJECTIONS TO THE ASSIGNMENT TO JOHN HERBERT CROOK WERE NOT CLEARLY ERRONEOUS AND MUST BE HERE AFFIRMED.

The standard which governed the District Court's review of the decisions and Order of the Referee (now Bankruptcy Judge), set forth in Rule 810 of the Bankruptcy Rules, is the "clearly erroneous" rule and is the same standard set forth in Rule 52(a), Federal Rules of Civil Procedure, governing this Court's review of the proceedings below. The Revisers of the Bankruptcy Rules state that "the rule... requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court".

Under Section 39c of the Bankruptcy Act and General Order 47, the cases from 1938 to date in support of that view are legion.

> "It is the settled rule that findings of fact by the referee are conclusive upon review by the district court unless clearly erroneous, and should not be disturbed by the district judge unless there is most cogent evidence of mistake or miscarriage of justice."

Collier on Bankruptcy, 14th Ed, Para. 39.28, p.1527;

McDowell v. John Deere Indus. Equipment Co. (C.A., Minn. 1972), 461 F. 2nd 48;

In re: Anjopa Paper & Board Mfg. Co. (S.D.N.Y. 1967), 269 F. Supp. 241;

In re: Ira Haupt & Co. (S.D.N.Y. 1967) 280 F. Supp. 341, aff'd 396 F. 2nd 444;

Moore v. U. S. (C. A. Texas 1969) 412 F. 2nd 974.

In two recent decisions by this Court, one of which was handed down in this Chapter XI Proceeding and concerned substantially the same issue here presented, the determinations of the Courts below were affirmed, in one instance in the face of serious doubt by the members of the Court whether any of them, if sitting as the District Judge, would have entered the orders there under review.

In Coalition For Education v. The Board of Elections of The City of New York, 495 F. 2nd 1090 (2nd Cir. 1974 Docket No. 74-1204), this Court stated:

> "(W)e have been instructed that the 'unless clearly erroneous' rule 'applies also to factual inferences from undisputed facts,'"

quoting from C.I.R. v. Duberstein, 363 U.S. 278,291 (1960). In Coalition, this Court was unable to make the "required

pronouncement of having a 'definite and firm conviction that a mistake has been committed', quoting from United States v. United States Gypsum Co., 333 U.S. 364,395 (1948) despite the Court's obvious discomfort with the inferences, findings and conclusions arrived at by the trial Judge from "rather scanty" and "meagre" evidence.

In Matter of Law Research Service, Inc., Appellant v. Martin Lutz Appellate Printers, Inc., Appellee, 498 F. 2nd 836 (2nd Cir. May 2, 1974, Docket No. 73-2113), this Court had before it a similar objection to a claim by an assignee of a portion of the Debtor's claim and judgment against Western Union. The Referee's allowance of the claim as entitled to share in the $455,000. fund on deposit and the affirmance by the District Court (Ryan, D.J.) were affirmed by this Court.

The burden of showing such error is on appellant.

In re: Berke, (E.D.N.Y. 1972)
350 F.Supp. 326.

In two well-reasoned decisions, the Bankruptcy Judge, after affording practically unlimited opportunity to Debtor, its expert bankruptcy counsel and its esteemed special counsel to present evidence, argument and authorities, determined all disputed questions of fact and credibility of witnesses in favor of the claimant.

The District Court specifically affirmed the findings of the Bankruptcy Judge in respect of consideration and filing and affirmed the order.

POINT II

THE ASSIGNMENT OF A PORTION OF THE DEBTOR'S CLAIM AGAINST WESTERN UNION WAS ABSOLUTE, BONA FIDE, GIVEN FOR PRESENT CONSIDERATION WHEN DEBTOR WAS NOT INSOLVENT AND VESTED PARAMOUNT TITLE THERETO IN JOHN HERBERT CROOK.

Debtor's assignment of a portion of its claim for damages against Western Union, made and delivered on November 28, 1969, was absolute and unconditional on its face. If the assigned claim was not paid by May 31, 1970, it continued in full force and effect. The only restriction imposed by the parties' contemporaneous agreement (4a-1), was that the existence of the assignment could not be thereafter used as an admission or declaration in the action pending in Texas between the Debtor and the assignee.

The consideration for the Assignment was an adjournment of Mr. Crook's pending Texas action for compensatory and punitive damages against the Debtor and its President, to May 31, 1970. This delay was of utmost importance to the Debtor, who was at that moment attempting to establish in the action against Western Union that the

damages sustained by its franchises should be paid by Western Union as additional and consequential damages flowing from Western Union's breach, rather than from fraudulent representations made by Debtor, its President and its agents, as alleged by Mr. Crook in the Texas action. The finding of the Bankruptcy Judge in that regard was expressly affirmed by the District Court (8a-1).

The Assignment was an absolute transfer and conveyance of Debtor's ownership of its claim and rights against Western Union to the extent of the amount assigned. (New York General Obligations Law, Sections 13-101, 13-103, 13-105). It did not purport to nor did it create only a lien or security interest. There was then and is now no requirement under New York law for any filing or recording by an assignee of such property to perfect ownership. The rule in New York is well settled that the rights of an assignee of an assignable chose in action are superior to those of a creditor of the assignor who attaches after the assignment.

In a decision directly in point, Chief Judge Breitel, then Justice presiding in the Appellate Division, First Department of the New York Supreme Court, set forth the rule governing the effect of an assignment in a law

suit of an interest in the plaintiff's existing contract cause of action, finding it to be "a present transfer" taking "immediate effect with respect to an existing cause of action", "a fully matured claim for breach of contract", although "quite uncertain as to realization because it was disputed and being seriously litigated", and, an "assignment..of the cause of action and not of an interest in a future judgment or fund."

> Stathos v. Murphy (App. Div. 1st Dept. 1966) 26 A.D. 2nd, 500, 276 N.Y.S. 2nd 727, aff'd. 19 N.Y. 2nd 883, 281 N.Y.S. 2nd 81.

The assignee prevailed over a judgment creditor of the assignor who attached subsequent to the assignment and prior to settlement of and realization from the law suit.

> See also, Goldfarb v. C. & K. Purchasing Corp., 170 Misc. 90, 9 N.Y.S. 2nd 95, cited in Williston on Contracts (Third Ed.) Sec. 434;
>
> Malone v. Bolstein, S.D.N.Y., 151 F. Supp.544 at 547, aff'd 244 F. 2nd 954 (2 Cir. 1957).
>
> Rockmore v. Lehman, 129 F. 2nd 892 (2Cir. 1942) cert. den., 317 U.S. 700.

Nor under the circumstances of the filing of the Debtor's petition for an Arrangement is the result any different. The transfer took place on November 28, 1969; although not required to perfect the assignee's title, notice was actually given to Western Union, the principal obligor,

on December 9, 1969. The petition herein was not filed until June of 1971. The transfer, therefore, fell without the four month period provided in Section 60 of the Bankruptcy Act.

The Bankruptcy Judge correctly held that Section 5019 of the New York Civil Practice Law and Rules is not a "notice" rule for the protection of creditors and rather, deals, by its terms, with the relationship between a judgment debtor, its judgment creditor and an assignee or other party succeeding to the rights of enforcement of the judgment, as affected by what the record reveals. His conclusion is reinforced by the fact that under New York law, actual notice given to the judgment debtor of the assignment would serve the same purpose, and prevent the judgment debtor from paying the judgment amount to the original judgment creditor except on peril of paying twice. This Court, when later presented with the same question in Matter of Law Research Service, Inc. v. Martin Lutz Appellate Printers, Inc., supra, came to the same conclusion.

Even if this Court had not interpreted Section 5019 accordingly, and a duty were imposed on an assignee to comply with that provision of the statute, the Bankruptcy Judge found compliance by Mr. Crook as a matter of fact.

The assignee's rights in the judgment as well as in the chose in action were brought into accord with that section of New York law on June 20, 1970, by the filing of the Assignment in due form in the office of the Clerk of the Supreme Court and County Clerk of New York. This constituted compliance by the assignee with the requirements imposed upon "a person other than the party recovering a judgment who becomes entitled to enforce it" by the language of Section 5019. The failure of the clerk to "make an appropriate entry on his docket of the judgment", if same occurred, is a clerical or ministerial error, in no way detracting from performance by the assignee in compliance with the statute, an error that could be corrected nunc pro tunc.

Tully v. Reclamation and Building Corp.
241 App. Div. 743, 269 N.Y.S. 835;

Catholic Women's Ben. Legion v. Burke
253 App. Div. 261, 1 N.Y.S. 2nd 720;
Section 5019, CPLR.

As this Court held in Matter of Law Research Service, Inc. v. Martin Lutz Appellate Printers, Inc., supra the only other statutory provision even remotely relevant is the Secured Transactions Article of the New York Uniform Commercial Code, Article 9, which by its express provisions excludes from its scope a "right represented by a judgment".

(Section 9-104 (h)). Since that Article deals only with security interests, and not with unconditionally assigned property interests, it is doubly inapplicable.

It follows, then, that an assignment which is found to be absolute in form and intent is enforceable as such. The Bankruptcy Judge also found as a matter of fact that the unambiguous language of the collateral agreement permitted the enforcement of the Assignment and, if the condition of payment by May 31, 1970 was not met, the continued prosecution of the law suit. Such findings were within the province of the trial judge and were not clearly erroneous.

Coalition For Education v. The Board of Elections of the City of New York, supra.

Fanciful speculations, not supported by a reading of the Assignment and collateral agreement, as to executory accords or equitable relief without any showing by Debtor of grounds therefor were properly rejected.

POINT III

THERE WAS NO EVIDENCE ADDUCED OF INSOLVENCY OF APPELLANT AT THE TIME OF THE ASSIGNMENT, NOR THAT THE ASSIGNMENT WAS MADE WITHOUT FAIR CONSIDERATION

The Bankruptcy Judge correctly refused to find

that the Debtor was insolvent at a time more than 18 months prior to the institution of the Chapter XI proceeding,because "the record is entirely barren of any proof" of that issue of fact. In the absence of such finding, the New York Debtor and Creditor Law has no application.

Appellant's parenthetical explanation of the supposed applicability of Zellerbach Paper Co. v. Valley National Bank, at page 31 of its brief, is so short as to be misleading. This alleged authoritative case was briefed for Judge Motley in this form, and obviously was rejected by her. The case actually held that the extension of a matured note of $11,000. for two months was not fair consideration for the transfer of real property worth $25,000., when the debtor, the holder of the property,was concededly insolvent. The decision pointed out that $11,000. was 56% less than the value of the property transferred.

The assignment of $25,923. given here was given for the adjournment for six months (three times the extension given in Zellerbach) of an imminent trial in which the Debtor and its President were being sued for compensatory and punitive damages for fraud. The correct comparison, if any, is between (a) the assignment of $25,923. worth of a chose in action, given for (b) the postponement for six

months of an imminent trial on a non-dischargeable claim exceeding $100,000. together with an opportunity to avoid the trial and risk entirely by meeting an explicit condition. The decisions of the courts below affirm the correctness of the comparison.

It should be noted that Appellee has consistently taken the position that the effect, if any, of the allowance of his claim on the continuation of his action in Texas seeking damages for fraud from the Appellant and its President (Appellants' contention in Point II of its Brief) was without the scope of the motion to disallow the claim. Nevertheless, the Bankruptcy Judge's determination of that question from his superior position as trial judge and Judge Motley's affirmance thereof were not erroneous. C.I.R. v. Duberstein, supra; Coalition for Education v. The Board of Elections of the City of New York, supra.

POINT IV

DECISIONS OF THE DISTRICT COURT QUESTIONING THE BANKRUPTCY JURISDICTION TO DISALLOW FILED CLAIMS ARE IRRELEVANT TO THIS APPEAL.

In its Supplemental Brief, Appellant has restated the facts of the case as viewed by it under the heading, Proceedings Below. Appellee has indicated his disagreement

with the conclusions and assumptions urged by Appellant in its principal and Supplemental Briefs by submitting the Counter-Statement of Facts of the Case, to which the Court is respectfully referred.

The decision of District Judge Werker as well as that of District Judge Weinfeld appear to conflict with the decision of this Court in Matter of Law Research Service, Inc. v. Martin Lutz Appellate Printers, Inc., supra, in which this Court affirmed the orders below allowing a secured creditor's claim.

An immediately apparent distinction is that in Hemba and in Matter of Oceana International, Inc. the respective debtors initially sought the aid of the Bankruptcy Court in attempts, in Oceana, to vacate foreclosure sales made by its creditor under security interests (chattel mortgages) and in Hemba, to disallow a secured claim. In Oceana International, Inc., the Bankruptcy Judge dismissed the debtor's summary proceedings brought against the secured creditor bank. District Judge Weinfeld affirmed the denial of such relief to the debtor.

In Hemba, in which District Judge Werker adopted Judge Weinfeld's reasoning, the order of the Bankruptcy Judge granting the Debtor's motion to disallow a secured claim was reversed, thereby permitting the claim to stand

unassailed.

In neither case did the creditor assert absolute ownership by reason of a bona fide transfer for value.

In the instant case as in Martin Lutz Appellate Printers, Inc. the Debtor was unsuccessful in disallowing the secured claims (secured in the case of Martin Lutz - a claim to title to a portion of the Western Union judgment settlement proceeds by this Appellee), and the successive reviews affirmed the denial of relief to the Debtor.

Contrary to Appellant's assertion in its Supplemental Brief, at page 7, only the Appellant "sought a determination of the secured claim" of Mr. Crook. As will be shown, the affirmance by this Court of the orders made by the Courts below will carry out Debtor's plan of arrangement, which expressly provides for distribution of the $455,000. fund to secured creditors and to assignees of the Debtor's claim and judgment against Western Union.

Judge Weinfeld, in Oceana International, Inc., recognized that under Section 370 of the Bankruptcy Act, 11 U.S.C. 770, the Bankruptcy Court retains jurisdiction "over the distribution of the consideration deposited for payment of the allowed claims." (376 F. Supp. at 959). Under the provisions of Section 57 (d) of the Bankruptcy

Act, 11 U.S.C. 93(d), claims are allowed upon filing unless there be objection to their allowance, necessarily, an objection which may be heard and acted upon by the Bankruptcy Court. If Oceana International, Inc. is accepted as having applicability to this proceeding, the orders below may be affirmed on the basis that the Debtor could not, after confirmation, attack an allowed claim (or a perfected transfer) and additionally as a valid exercise by the Bankruptcy Judge under his retained jurisdiction under Section 370 to direct distribution of the money deposited by the Debtor for payment of the portion of the Western Union judgment settlement proceeds belonging to Mr. Crook.

If Judge Weinfeld's view is held not pertinent here, the Court should affirm the orders below for absence of error.

The result arrived at and the reasons therefor given by the Sixth Circuit Court of Appeals in Matter of Patton Manufacturing Company, Debtor (1969), 413 F. 2nd 1258, at 1262, certiorari denied, 90S. Ct. 555, 396 U.S. 1004, lends support to the foregoing.

CONCLUSION

The Order appealed from correctly affirmed the findings and Order of the Bankruptcy Judge, which denied Appellant's application to vacate the 1969 transfer to Appellee of a portion of the claim and judgment against The Western Union Telegraph Company, and should be affirmed.

Respectfully Submitted,

RICHARD L. ARONSTEIN,
Attorney for Appellee

CERTIFICATE OF SERVICE

JOSEPHINE KRIEGER certifies that she resides at 3150 Rochambeau Avenue, Bronx, N. Y. 10467, is not a party to this action and is over the age of 18 years.

That on the 3rd day of January, 1975, she served two copies of the within Brief for Appellee upon Krause, Hirsch & Gross, Esqs., attorneys for Appellant, Special Counsel, Ellias C. Hoppenfeld, Esq., by depositing same in a postpaid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to said attorneys at P. O. Box 125, Scarsdale Station, Scarsdale, New York 10583.

Dated, January 3, 1975.

Josephine Krieger

JOSEPHINE KRIEGER